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Federal Communications Commission
Washington, D.C. 20554

DISPATCHED BY

MM Docket No. 93-94

In re Applications of

SCRIPPS HOWARD File No. BRCT-910603KX
BROADCASTING COMPANYFor Renewal of License of Station WMAR-TV
Baltimore, Maryland

and

FOUR JACKS File No. BPCT-910903KE
BROADCASTING, INC.For a Construction Permit for a New
Television Facility on Channel 2
at Baltimore, Maryland**Appearances**

Kenneth C. Howard, Jr., Leonard C. Greenebaum, Sean H. Lane, Stephanie S. Abrutyn and Ronald F. Wick on behalf of Scripps Howard Broadcasting Company; *Martin R. Leader, Kathryn R. Schmeltzer and Gregory L. Masters* on behalf of Four Jacks Broadcasting, Inc.; and *Charles E. Dziedzic and Robert A. Zauner* on behalf of the Chief, Mass Media Bureau.

**PARTIAL INITIAL DECISION OF ADMINISTRATIVE
LAW JUDGE RICHARD L. SIPPEL**

Issued: May 10, 1995;

Released: May 18, 1995

PRELIMINARY STATEMENT

1. This case was commenced by *Hearing Designation Order* DA 93-340 ("HDO") published in 8 F.C.C. Rcd 2326, released April 1, 1993. It is a comparative proceeding on the renewal of the broadcast license of VHF Station WMAR-TV (Channel 2) held by Scripps Howard Broad-

casting Company ("Scripps Howard") and the competing application of Four Jacks Broadcasting, Inc. ("Four Jacks") for a construction permit for a new television facility on Channel 2 at Baltimore, Maryland. The issues set under the HDO are:

To determine with respect to Four Jacks whether there is reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation.

To determine which of the proposals would, on a comparative basis, better serve the public interest.

To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. This *Partial Initial Decision* decides only the qualifying issues that were added by the Presiding Judge against both parties after the release of the HDO. Rulings on these issues may resolve this case without the necessity for a resolution of the comparative issue.¹ *Garden State Broadcasting Limited Partnership v. F.C.C.*, 996 F.2d 386, 394 n.10 (D.C. Cir. 1993) (where Commission disqualifies a challenging applicant a full comparative hearing is not necessary).

3. Four Jacks received a favorable summary disposition of the air hazard issue. *Memorandum Opinion and Order*, FCC 93M-315, released June 1, 1993. Phase I hearings were held on November 8, 9, 10, 12, 15 and 16, 1993 in Washington, D.C. There have been no proposed findings filed on the comparative issue.²

4. On February 1, 1994, issues were added against both parties based on posthearing filings. See *Memorandum Opinion and Order* FCC 94M-50 (qualifying issues added against Scripps Howard) and *Memorandum Opinion and Order*, FCC 94M-51 (qualifying issues added against Four Jacks). These issues could not be resolved by summary decision. See *Memorandum Opinion and Order*, 94M-177, released March 18, 1994 (Scripps Howard's motion denied) and *Memorandum Opinion and Order*, FCC 94M-246, released April 11, 1994 (Four Jacks' motion denied). Phase II hearings were held on the issues added against Scripps Howard on September 7-8, 1994, and on the issues added against Four Jacks on September 12-14, 1994. In accordance with a briefing schedule requested by the parties,

¹ On February 25, 1994, the Commission ordered the freezing of all comparative issues while it reviews the comparative criteria. *Public Notice* 9 F.C.C. Rcd 1055 (1994). That freeze order was responsive to a judicial determination that the integration criterion was arbitrary and capricious and therefore unlawful. *Bechtel v. F.C.C.*, 10 F.3d 875 (D.C. Cir. 1993). The Commission authorized the continued litigation of qualifying issues provided that the case could be fully resolved without the need for subsequent comparative findings. See *Public Notice* FCC 94-204 (released August 4, 1994) *Modification of FCC Comparative Pro-*

ceedings Freeze Policy (Commission reaffirms that during freeze Administrative Law Judges will continue to issue decisions where consideration of comparative qualifications is unnecessary to resolve the case).

² The parties were scheduled to file proposed findings on the comparative issue on January 14, 1994. At the request of the parties, that date was cancelled and the parties were allowed to file on February 15, 1994. See *Order* FCC 93M-771, released December 29, 1993. Later, that date was cancelled in light of *Bechtel*, *supra*. See *Order* FCC 94M-53, released February 2,

Proposed Findings of Fact and Conclusions of Law were filed on December 23, 1994, and Reply Findings and Conclusions were filed on February 1, 1995.³

FINDINGS OF FACT⁴

Scripps Howard Broadcasting Company

5. Findings are made with respect to Scripps Howard on the following issues:

A. To determine whether Scripps Howard misrepresented or was lacking in candor in connection with deposition testimony and/or pleadings and/or delayed production in discovery relating to NBC documents used in connection with preparing a hearing exhibit that was relevant to the renewal expectancy.

B. To determine whether Scripps Howard misrepresented or was lacking in candor in connection with deposition testimony and/or pleadings and/or correspondence served on the Commission relating to the status of Janet Covington's diary of 1991 and/or Janet Covington's notes of 1992 which were used in connection with preparing a hearing exhibit that was relevant to the renewal expectancy.

C. To determine the effect of the foregoing issues on the qualifications of Scripps Howard to hold a Commission license for Channel 2 in Baltimore, Maryland.

Memorandum Opinion and Order FCC 94M-50, released February 1, 1994. The issues were sought by Four Jacks and were opposed by the Bureau.

6. The license renewal period for Scripps Howard was May 30 to September 3, 1991. Four Jacks filed its application on September 3, the last day of the renewal period. (SH Exh. 46.) A renewal expectancy will be awarded to an incumbent licensee provided that community related programming which meet ascertained community needs can be shown to have been developed, programmed and broadcast by the licensee during the renewal period. It is an important issue for an incumbent licensee to establish. The initial discovery efforts of Four Jacks had focused on Scripps Howard documents that would show whether and how Scripps Howard had sought to ascertain community needs.

7. In the Summer of 1992, Scripps Howard's counsel instructed Ms. Emily Barr, WMAR-TV's Director of Broadcast Operations, on how to prepare an exhibit that would

qualify for the renewal expectancy. (Tr. 576.) She prepared such an exhibit from information concerning ascertainment efforts which she obtained from her own calendar entries and from the calendar entries of the station's General Manager, the Director of Public Relations, and Mrs. Covington, who was formerly the Director of Public Affairs. Mrs. Covington had retired in December 1991. (Tr. 576-77, 657.) Ms. Barr also spoke with those same persons about their ascertainment activities during the renewal period. (Tr. 576.) Based on the efforts of Ms. Barr, Scripps Howard compiled a hearing exhibit containing the universe of its evidence on renewal expectancy. (See SH Exh. 3 Att. E.)

8. On June 11, 1993, Four Jacks served a Motion For Production Of Documents. The Presiding Judge ordered Scripps Howard to produce, *inter alia*, (a) copies of all of its Issues/Programs Lists for the renewal period that relate to programming; (b) copies of all documents relating to the Issues/Programs Lists; and (c) copies of all program logs for the renewal period. See *Order* FCC 93M-400, released June 24, 1993. A request by Four Jacks for all documents that Scripps Howard considered relevant to its claim for a renewal expectancy was denied by the Presiding Judge because it was too broad and it would require Scripps Howard to disclose legal theories and thought processes. *Id.*

9. In the course of the ensuing document production, Scripps Howard failed to turn over copies of facsimile correspondence between Scripps Howard and NBC regarding NBC program printouts. The NBC printouts were retrieved at Scripps Howard's request for the purpose of determining the programming of NBC which might qualify as evidence relevant to renewal expectancy. Scripps Howard also failed to produce copies of Mrs. Covington's calendar for 1991 or copies of her notes which she had compiled in 1992 from her 1991 diary entries. The facsimile correspondence relating to the NBC printouts and the Covington notes were relevant to Four Jacks' discovery and were responsive to the Presiding Judge's *Order*. It is found as a fact that Scripps Howard had the documents but failed to produce them on time.

NBC Facsimile Correspondence

10. A discovery dispute arose over Scripps Howard's NBC facsimile correspondence (sometimes referred to only as "correspondence") shortly before the first evidentiary admissions session. Records of NBC programming were not retained by Scripps Howard. Not even records of network programming that were issue responsive were retained. In order to fill that gap, Ms. Barr contacted NBC for information on the relevant network issues-responsive programming that WMAR-TV had aired during the license term.⁵ Complete copies of the NBC programming documents

1994.

³ If one or both of the applicants is found to be basically unqualified, there would be no need for further consideration of this case under revised comparative criteria. See *Garden State Broadcasting, supra*. Alternatively, based on representations in a Joint Request For Approval Of Settlement Agreement that was recently filed, if both parties should be determined to be qualified, the parties will withdraw from this litigation. Under the Agreement, Four Jacks' application would be dismissed with prejudice and Scripps Howard's renewal application would be granted. Each party is to pay their respective costs and there will be no payment to Four Jacks in return for its dismissal. Other non-adjudicative proceedings not in issue here that are

before the Commission or a Bureau Chief would be dismissed voluntarily. There also would be no payoffs in connection with those dismissals. The Bureau has no objection to the Settlement.

⁴ Exhibits are referred to as "SH Exh." for Scripps Howard and "FJ Exh." for Four Jacks. Reference is made to Proposed Findings of Fact and Conclusions of Law as "PFC". Reply Findings and Conclusions are referred to as "RPFC". The Integration and Diversification Statement filed by Four Jacks is referred to as the "IDS".

⁵ During the Summer of 1992, Ms. Barr contacted NBC's archivists in New York and in Los Angeles. Each of the archivists returned Ms. Barr's telephone calls and verified the

were timely furnished to Four Jacks in discovery. It was Ms. Barr's requesting facsimile correspondence that was the subject of the proposed subpoena.

11. On August 10, 1992, Ms. Barr had communicated to the NBC archivists in her facsimile message that:

[W]e are in the midst of a license challenge and need information about specific NBC programming (both news and non-news) for our attorneys. As I mentioned on Friday, we are looking for examples of programming, both network and local that dealt with the ascertained issues we identified through interviews and local community leaders. The period in question is June 1, 1991 through September 30, 1991 and the issues are as follows: [Twenty issues specified].⁶

(SH Exh. 36 at 2 and Tab A; FJ Exh. 19.) This evidence would be probative of Scripps Howard's reliance on NBC for its local ascertainment. Ms. Barr was deposed on July 16, 1993. In her deposition, she accurately described the message that she had sent to the two NBC offices. But she also stated, erroneously, that she had not retained copies of the facsimile. (SH Exh. 36 at 3 and Tr. 1708.) Specifically, when asked at her deposition if she had a copy of her facsimile she responded "No, I don't."

12. Three months later, Four Jacks decided to seek the evidence from NBC through a subpoena. On October 20, 1993, eighteen days before the Phase I hearing, Four Jacks submitted a request for subpoena which the Presiding Judge denied. It was held that Four Jacks was seeking relevant discovery evidence. However, in view of the passage of time from the July deposition, the imminence of the hearing date, and the possibility of delay in the enforcement of a third-party subpoena or in the search for the documents at NBC, Four Jacks' request for a subpoena was denied. See Order FCC 93M-672, released October 23, 1993.

13. Four Jacks filed a Request For An Interlocutory Appeal and Scripps Howard filed an Opposition. The Presiding Judge called a conference for October 27, 1993, in an effort to resolve the discovery dispute without further litigation and without delaying the hearing. Scripps Howard had represented in its Opposition of October 26, 1993, that the NBC correspondence (Barr's facsimile to NBC and Cole's facsimile response) was not in the possession of WMAR-TV and that a search for the documents would be time consuming. At the conference held the next day, Scripps Howard's counsel disclosed that the NBC facsimile

correspondence had been discovered by Ms. Barr after she had been asked to look again for the NBC correspondence. (Tr. 1710-12.) The documents were then sent by Ms. Barr to Scripps Howard's counsel by facsimile transmission at 5:45 p.m. on October 26, 1993.

14. Four Jacks asserts that Scripps Howard had a motive to keep the NBC correspondence from being discovered because they would have been used in deposition discovery of Ms. Barr to show that Scripps Howard's ascertainment had to be constructed in 1992 through NBC because the station's internal contemporaneous programs/issues lists for 1991 were missing. See Four Jacks RPFC at 5 and fn.6, *supra*.

Janet Covington's Notes

15. Scripps Howard had no prescribed system for retaining information on efforts to ascertain community needs and interests. Therefore, in the course of her preparation of the renewal exhibit in the Summer of 1992, Ms. Barr relied on her calendar notations for the relevant information. She also intended to obtain the calendars of three other persons who had relevant information: Arnold J. Kleiner, Maria Vellegia, and Janet Covington. (SH Exh. 36 at 5.) In addition, she spoke with these individuals about their activities and recollections.

16. Ms. Barr secured the calendars of Mr. Kleiner and Ms. Vellegia. However, Mrs. Covington had retired from Scripps Howard at the end of 1991. When Ms. Barr contacted Mrs. Covington, the latter advised that she had her calendar. Mrs. Covington offered to construct notes of her calendar entries which would be more readable than her original calendar notations. (SH Exh. 38 at 37-38.) Mrs. Covington had formed an opinion that her calendar "short-hand" entries would contain dates and names that would be meaningless to others without further explanation. (SH Exh. 38 at 39-40, 42.) Ms. Barr accepted the offer without verifying the legibility of the calendar entries and requested specifics on the dates of meetings, the identities of persons who attended, and summaries of the subjects discussed. (SH Exh. 36 at 6.) Mrs. Covington prepared the notes and forwarded them to Ms. Barr. (SH Exh. 36 at 6.) Mrs. Covington did not retain a copy of her notes and she was not furnished a copy by Scripps Howard. (SH Exh. 38 at 54.)

17. Ms. Barr testified that she made considerable use of the Covington notes for items that she thought should be included in the Scripps Howard ascertainment exhibit. She edited Mrs. Covington's notes for selective inclusion in Scripps Howard's renewal exhibit. (SH Exh. 36 at 7 and

availability of the information. Shortly thereafter, on August 10, 1992, Ms. Barr sent facsimile requests to both NBC sources for programming that dealt with twenty ascertained issues. (SH Exh. 36 at 2; Tab A; and FJ Exh. 19.) The issues identified for NBC were taken directly from WMAR-TV's issues and program lists. (SH Exh. 36 at 17-18.) The New York archivist, Nancy Cole, responded to Ms. Barr's request by facsimile which included examples of the types of documentation that were available. After receiving Cole's facsimile, Ms. Barr informed her by telephone that the NBC documents would be appropriate. (SH Exh. 36 at 2.) Ms. Barr received responsive programming documents from NBC offices in New York City (news) and Los Angeles (entertainment) totalling over two thousand pages. She made copies of the documents before sending them to Scripps Howard's attorneys.

⁶ Four Jacks notes that WMAR-TV's second quarter is-

sues/programs lists for 1991 reflected the issues of unemployment, the media, social welfare and child abuse. But those issues were not included in the third quarter's issues/programs lists. The third quarter issues were set on October 10, 1991, after the third quarter had expired. The lists contained seven new issues: literacy, economic development, homelessness, redistricting, the Supreme Court, cultural development and youth concerns. (SH Exh. 3, Att. F; Tr. 614-15.) The importance of the renewal expectancy provides a motive for an incumbent to model issues/programs lists to programming after the fact. But there is no indication that WMAR-TV's programming was fabricated. Therefore, there is no evidence of a misrepresentation and the addition of after-the-fact issues bears only on the lesser weight to be given the renewal evidence which is not directly at issue at this time.

SH Exh. 37.) There is some evidence that after receiving the notes, Ms. Barr and Mrs. Covington discussed some of the entries. (SH Exh. 36 at 6.) At the insistence of Scripps Howard's attorneys, Ms. Barr asked Mrs. Covington for the calendar in the Summer of 1993. (SH Exh. 36 at 8-9.) By that time, Mrs. Covington and her husband had moved their residence and the calendar could not be found. (SH Exh. 38 at 38, 55.) There was testimony of Ms. Barr which is sufficient to show that she had failed to organize the calendars in a central place until 1993. (SH Exh. 36 at 7 and Scripps Howard's PFC at 15 reflect that calendars and the Covington notes were for a time left in a pile on the floor of her office.) The materials were eventually stored by Ms. Barr in a file cabinet sometime in 1993 and these were later transferred to another file cabinet in late 1993 or 1994. (SH Exh. 36 at 7-8.) It was determined that in June 1993, Ms. Barr had sent the Covington notes to Scripps Howard's attorneys and that she had kept a copy.

18. It was in June-July of 1993 that Ms. Barr began to assemble documents in response to Four Jacks' document request. (SH Exh. 36 at 8.) It was also at that time that Scripps Howard's attorneys requested from Ms. Barr the calendars that were used for the renewal exhibit, including Mrs. Covington's calendar. (*Id.*) Ms. Barr informed Scripps Howard's counsel that she had no calendar for Mrs. Covington but that she had relied on the Covington notes. She believed at the time of her deposition in July 1993 that she had discarded the Covington notes. (SH Exh. 36 at 12.) In fact, she had forwarded the original set of Covington notes to Scripps Howard's counsel on June 25, 1993. (SH Exh. 36 at 9 and FJ Exh. 31.) However, in her testimony and on cross-examination, Ms. Barr asserted that she could not recollect sending the Covington notes to counsel or making a copy of the notes. (SH Exh. 36 at 8 and Tr. 1600, 1607, 1609.) Later, in February 1994, the notes which Ms. Barr had sent to counsel were found in the files of the law firm and a copy of those notes was located in Ms. Barr's file drawer.

19. After the issues were added, an attorney visited Ms. Barr in order to prepare for the Phase II hearing. There was no specific effort made to find the Covington notes which up to that point were believed to have been discarded. But for some other purpose, Ms. Barr looked into a file which she had in her cabinet that was marked "Memos To B&H [Baker & Hostetler]". There she found a copy of the Covington notes. She testified that she had no recollection of ever making a copy of the Covington notes or of placing the copy in the file drawer. That copy of the Covington notes also contained a cover sheet which was a "post it" note that Ms. Barr had written stating: "Janet Covington's original notes to me regarding appointments/ascertainments. She did not save the original calendar." (SH Exh. 36 at 9-10.) Ms. Barr also had sent a separate memorandum to an attorney at Baker & Hostetler dated June 25, 1993, which identified the Covington notes as having been prepared "specifically for this license challenge issue but she did not save her actual calendar." (FJ Exh. 31.)⁷

20. On July 13, 1993, eighteen days after Ms. Barr had sent the Covington notes to Baker & Hostetler, an attorney stated in a letter to Four Jacks' counsel that Mrs. Covington had once possessed notes prepared in 1991 that recorded various ascertainment meetings but she had not retained those notes. (FJ Exh. 30.) That statement was inaccurate because it at least implied that Mrs. Covington had prepared contemporaneous notes in 1991 when in fact the notes were a reconstruction prepared in 1992 for the purpose of assisting Ms. Barr in her preparation of Scripps Howard's renewal exhibit. Ms. Barr did not participate in the preparation of that letter. She also corrected the misstatement in her testimony. (SH Exh. 36 at 13 and Tr. 1587-88.) However, at the time the July 13 letter was written, a copy of the notes were in Ms. Barr's file cabinet and the original of the notes were lodged with Scripps Howard's counsel. It is accepted that Ms. Barr probably had forgotten that she still had a copy of the Covington notes. There was testimony received from a legal assistant at Baker & Hostetler who undertook a search on February 10, 1994, after Scripps Howard's attorneys learned that the copy of the notes had been discovered. He testified that the notes had been placed in a box at the law firm which was segregated from working files and which was marked:

Documents sent by station but not produced because outside time period or because work product.

Counsel for Four Jacks and the Presiding Judge were notified promptly of this oversight and copies were made available forthwith. (Tr. 1539, 1743, and FJ Exh. 29.)

21. These mishaps in discovery are not substantial evidence of an attempt to mislead or deceive on the part of Scripps Howard. Nor has Scripps Howard lacked decisional candor with respect to the NBC correspondence or the Covington notes. Scripps Howard had done its job in June 23, 1993, when Ms. Barr sent the original Covington notes to Baker & Hostetler. She also had sent a cover memorandum on that date stating that she was forwarding the documents and advising officers of Scripps Howard of that fact by furnishing copies to them of the transmitting memorandum. There is no basis on the facts here to conclude that Scripps Howard knowingly participated in the manner in which its attorneys later handled the evidence.

22. Had there been an efficient production of the documents at the discovery phase there would have been no need to add the issues against Scripps Howard. But the circumstances as they unfolded left no alternative but to investigate fully, at Four Jacks' request, the fate of the documents which were clearly relevant and material to Scripps Howard's claimed renewal expectancy. It was determined that there was an unfortunate failure to retrieve documents at Scripps Howard and at the offices of its attorneys which caused expense and delay to Four Jacks, to Scripps Howard and to the Commission. However, it appears that attorneys directly responsible for the storage of the notes considered them to be work product and/or they secured the original of the document in a box reserved for documents which had been screened and had been deter-

⁷ That latter notation is probative of a claimed work product exemption from discovery. But the Presiding Judge denied application of the work product exemption on the grounds that Four Jacks had shown a specific need for the notes, particularly since the Covington calendar was considered lost. *Memorandum*

Opinion And Order FCC 94M-50, supra. at Para. 13 and n.5. (Four Jacks had not been told that notes were believed discarded until Ms. Barr was deposed in July 1993. Scripps Howard had failed to use the prescribed procedures for seeking in camera review and protection of the notes as a work product.)

mined to be outside the relevant time period. Therefore, as a result of a mishap, the Covington notes were not timely made available to Four Jacks in discovery.⁸ The NBC correspondence and the Covington notes, which are the evidence that has been the subject of the issues, are not wholly incriminating. And to some degree, aside from their weight, the notes might support Scripps Howard's claim of a renewal expectancy. Therefore, there is no apparent motive found for Scripps Howard, either directly or through its counsel, to deliberately withhold the NBC correspondence or the Covington notes from Four Jacks or from the Commission.

Four Jacks Broadcasting, Inc.

23. Findings are made with respect to Four Jacks on the following issues that were added:

A. To determine whether Four Jacks misrepresented or lacked candor before the Commission in its application, pleadings, documents and/or testimony regarding its integration commitment to resign then current employment positions of David D. Smith, Robert E. Smith, and/or Frederick G. Smith.

B. To determine the effect of the foregoing issue on the qualifications of Four Jacks to receive a Commission license for Channel 2 in Baltimore, MD.

Memorandum Opinion and Order FCC 94M-51, released February 1, 1994. The issues were sought by Scripps Howard and were opposed by the Bureau.

24. Four Jacks has no ownership interest in or control over any medium of mass communication. Four Jacks is affiliated through common ownership with Sinclair Broadcast Group, Inc. ("Sinclair"), a holding company. The officers, directors and shareholders of Four Jacks control Sinclair through their stock ownerships and their positions as directors and officers of Sinclair. They are: David, Robert, Frederick, and J. Duncan Smith. (FJ Exhs. 1, 2 and 3 at 1-2.) The four Smiths are also related as brothers.⁹

Sinclair's Business

25. The evidence shows that through various subsidiaries, Sinclair owns and operates television stations WBFF(TV), Baltimore, Maryland; WPGH-TV, Pittsburgh, Pennsylvania; WTTE(TV), Columbus, Ohio; WTO(TV), Pennsylvania; Alabama; and WCGV-TV, Milwaukee, Wisconsin. The stations in Columbus, Baltimore and Pittsburgh are Fox affiliates. The Birmingham station WTO(TV) and the Milwaukee station WCGV-TV were acquired by Sinclair subsidiaries subsequent to the Phase I portion of this case. On November 22, 1994, the Commission granted an application for consent to the acquisition by a Sinclair subsidiary of television station WLFL(TV), Raleigh North Carolina. (FJ Exh. 1 at 2; Tr. 1793-94; FJ PFC at 48 n.15.) Sinclair's business is the management of its subsidiary tele-

vision stations. (Tr. 1778-79.) That business also includes planning Sinclair's expansion as a holding company and providing programming for other stations in Sinclair's markets. (Tr. 1779; SH Exh. 40, Tab 14 at 44 [strategy] and 14 [programming service agreements with WNUV and WVTV].)

26. At the time of the hearing, Four Jacks had filed disclosure documents with the U.S. Securities & Exchange Commission ("SEC") in connection with a contemplated public offering of debentures, seeking initially to raise \$100,000,000, an amount later increased to \$200,000,000. The funds were to be used to refinance an existing bank debt and for business expansion. (SH Exh. 40 at Tab 14 and at Tab 17 [the "Prospectus"].) One of Sinclair's publicly disclosed operating strategies was "to acquire additional broadcast properties which offer attractive growth opportunities." (SH Exh. 31 at 4, 47.)

27. On September 3, 1991, Four Jacks filed its application for Channel 2 which had recently been acquired by Scripps Howard. The license renewal period was coming to a close. Strategically, it was an opportune time for Sinclair to file a competing application. In keeping with Sinclair's publicly disclosed acquisition strategy, Sinclair was presented with an opportunity to acquire a VHF station at a comparatively low cost. Sinclair would be required to divest its interest in its Baltimore UHF Station WBFF(TV) if it succeeded in its effort to acquire VHF Station WMAR-TV in Baltimore. The award of a construction permit for a VHF facility in the Baltimore market on condition of divesting WBFF(TV) could have been an advantageous exchange.

28. Four Jacks presented evidence at the hearing seeking to show that it was feasible for the Smiths to remain as officers, directors and owners of Sinclair, and to continue to carry out their responsibilities at Sinclair while integrating into the management of Channel 2. From the evidence it appears that the proposal for the Smiths to manage Station WMAR-TV full-time without resigning from Sinclair, or without placing their Sinclair ownership in trust or some similar arrangement, probably would not be a feasible proposal. But the issue for resolution at this stage of the proceeding is only whether Four Jacks filed disclosures at the Commission and/or presented testimony which misrepresented or which was lacking in candor with respect to its integration proposal.

Application Disclosure

29. Four Jacks' Form 301 Application was filed on September 3, 1991. It disclosed that David, Robert and Frederick Smith "will resign from their then-current employment." (SH Exh. 46 [Form 301 Exh. 6] and Tr. 1984.) J. Duncan Smith, the fourth brother, was not proposed for integration and so there was no similar pledge for him. The Commission was further advised in the same application disclosure:

⁸ The Presiding Judge has ruled previously that Baker & Hostetler's reading of the Four Jacks' document request was possible, even if overly narrow and technical. *Memorandum Opinion and Order*, FCC 94M-177, released March 18, 1994 at n.2. That ruling remains the law of the case.

⁹ Each owns 25% of Sinclair's stock and each serves as a

Sinclair director. David Smith is President, Chair of the Board, Chief Executive Officer and a Director of Sinclair; Robert Smith is Vice President, Treasurer and a Director; Frederick Smith is Vice President, Assistant Treasurer and a Director; and Duncan Smith is Vice President, Secretary and a Director. (FJ Exh. 2 at 5; Tr. 1073-74, 1296.)

Presently, Sinclair Broadcast Group, Inc., the ultimate parent of television station, WBFF(TV), Baltimore, Maryland, is managed by a committee consisting of the four Smith Brothers. All decisions are made by them jointly and they are involved in all aspects of the day-to-day operation of the station. David Smith is primarily responsible for negotiation and selection of film product for the station. The other brothers, however, share this task with him.

When the application for Channel 2 is granted, David, Robert, and Frederick will be involved in the day-to-day operations of Channel 2 on a full-time basis as described above. Though they will carry, respectively, the titles of General Manager, Station Manager, and Operations Manager, *they will run the proposed family-owned station as a management committee*, ultimately sharing responsibilities for all aspects of station management and operations. As noted in the application, each is an officer and director of the applicant and each will be a full-time management employee of the applicant if its application for Channel 2, Baltimore, Maryland, is granted. To fulfill their integration commitments, each of the brothers will resign from their then-current employment and will limit or terminate any other activities that might interfere with their integration commitments. (Emphasis added.)

This disclosure obfuscates more than it clarifies. On the one hand, the Commission is advised by Four Jacks to ignore the respective management titles that were ascribed to David, Robert and Frederick because they will share responsibilities. See *Petition for Reconsideration and/or Clarification*, 7 F.C.C. Rcd 6800-01 (Comm'n 1992) (identified management must report to work at main studio on daily basis, spend substantial time there, use the station as "home base" and must not "ghost manage"). Then the Commission is advised that the integration of the Smiths into those positions will be able to be fulfilled because each of the brothers will resign from "then-current employment" and each will "limit or terminate" any other activities that might interfere with their integration commitments. After hearing and observing the Smiths testify, these conflicting disclosures are resolved by concluding that the Smiths have always intended to run Channel 2 as a committee from their Sinclair offices. But that intention was not fully disclosed to the Commission in Four Jacks' disclosure documents.

Integration Statement Disclosure

30. On April 6, 1993, the Presiding Judge ordered each party to file a "full, complete, and definitive statement of their respective integration proposals." *Prehearing Conference Order FCC 93M-146*. It was ordered that:

the parties must state specifically their hourly integration commitments and their definitive intentions to leave their current employment and other business positions and ventures (service on board of directors, ownership of businesses).

Id. In response to that directive, Four Jacks filed its Integration and Diversification Statement ("IDS") on May 7, 1993, which disclosed that each of the three integrating Smiths:

will participate full-time, a minimum of 40 hours per week, in the management of the proposed facility--[and] will resign from his then-current employment and will limit or terminate any other activities that might interfere with his integration commitment.

(SH Exh. 47 at 2-3.)

Written Testimony Disclosure

31. On September 13, 1993, Four Jacks exchanged its written direct testimony and stated with respect to each of the Smiths proposed for integration that:

[i]n the event of a grant of the Four Jacks' application, to fulfill my integration commitment, I will resign from my then current employment and will limit or terminate any other activities that might interfere with my integration commitment.

(FJ Exhs. 2, 3 and 4.) The written testimony stated further that:

[N]otwithstanding SBG's [Sinclair's] other media interests, I am able and committed to carrying out my pledge to manage, on a full time basis, a VHF television station in Baltimore, Maryland.

Id.

32. The Bureau notes and it is found here that there is no evidence of the Smiths specifically pledging to relinquish ownership of Sinclair or to leave their positions as officers and directors of Sinclair. But the converse is also true with respect to the three disclosures. There is no evidence in the disclosures that the Smiths specifically excluded Sinclair ownership and their positions with Sinclair as officers, directors and managers from the broad pledge to divest their then-current employment.¹⁰ Therefore, the inquiry has focused on why Four Jacks left its integration disclosure to the Commission incomplete and whether such incomplete disclosure was intentionally misleading and/or lacking in candor.

¹⁰ Four Jacks earlier represented in its Form 301 Application that "in mid-1988, [Robert Smith] became a full-time employee of Channel 45's parent, Sinclair Broadcast Group, Inc." (SH Exh. 46 [Exh. 6 at 2-3] and Tr. 2011.) The Application also represented that Frederick Smith "became a full-time employee of Sinclair Broadcast Group, Inc. on July 1, 1991." (SH Exh. 46.) David Smith testified that he works "as an employee" in

the Baltimore office, Robert Smith testified to his present "employment" as he was asked on cross-examination, and Frederick Smith similarly confirmed his "employment" on cross-examination. (Tr. 1134; Tr. 1239, 2013; and Tr. 1371.) Therefore, it is concluded that the Smiths accepted the practice of being referred to as employees of Sinclair in state and federal disclosure and reporting documents.

Initial SEC Disclosure

33. While making the above disclosures at the Commission (wherein Four Jacks left unclear whether the Smiths would remain with Sinclair after receiving Channel 2) Sinclair, under common control of the Smiths, was making related but different disclosures at the SEC. On September 28, 1993, Sinclair stated to the SEC:

[M]embers of the Smith Family hold ownership interests in various non-Company entities which are involved in businesses related to the business of the Company [e.g. Four Jacks]—.

Members of the Smith Family are free to continue to own these interests and to acquire additional interests in television industry enterprises, including interests in enterprises that are competitive with the Company or the Subsidiaries. *Such activities could present a conflict of interest with the Company in the allocation of management time and resources of executive officers and in diversion of corporate opportunities.*

(SH Exh. 26 at 15.) (Emphasis added.) That same disclosure was filed with the SEC again on November 9, 1993, while the Phase I hearing was underway. (SH Exh. 31 at 15-16.) At that time, Sinclair was in the process of seeking millions of dollars from public investors to expand a business which would compete for the time of the Smiths if the Smiths actually were involved in the day-to-day management of Channel 2. Sinclair found it necessary to disclose the risk to prospective investors that the acquisition of Channel 2 by Four Jacks, with the attendant duty to carry out a full-time integration pledge, could present a conflict in the allocation of the Smiths' time between Sinclair and Four Jacks (although the name "Four Jacks" was not used in the disclosure). That SEC disclosure supports the interpretation that the proposal to leave "then-current" employment included a promise to leave employment at Sinclair in order for the Smiths to meet the forty hour per week integration commitments. However, the weight of the testimonial evidence and later SEC disclosures establishes that there was never any intention on the part of the Smiths to be taken away by the Four Jacks venture from the day-to-day management of Sinclair. As discussed below, the SEC staff apparently saw the hedged risk and required more specific disclosure about the Smiths' intentions to stay with Sinclair even if Four Jacks succeeded in obtaining Channel 2.¹¹

Posthearing SEC Disclosure

34. By December 1993, a month after the Phase I hearing and the conclusion of the Smiths cross-examination, Sinclair's SEC Prospectus contained even more specific information about Four Jacks' Form 301 Application (where the representations had been made that the Smiths "would resign from their then-current employment and

limit or terminate any other activities that might interfere with their commitments to Four Jacks" [SH Exh. 34 at 19]). Sinclair disclosed to the SEC:

The Company [Sinclair] does not believe that such commitment of resignation requires them [the Smiths] to resign as officers or directors of the Company or to dispose of their ownership interests in the Company.

Further, the Company has been informed by its FCC regulatory counsel and each of these officers that in neither the application nor the FCC proceeding with respect to Four Jacks has any of these officers committed to resign his official positions with, or dispose of his ownership interests in, the Company in the event that Four Jacks is awarded such channel by the FCC. Moreover, the Company believes that each [of the Smiths] will be able to perform all of his current duties with the Company while fulfilling his commitment to work for Channel 2.

(SH Exh. 34 at 19.) This is a far more precise and a much more complete description than the earlier disclosures made by Four Jacks to the Commission in the Form 301 Application, the IDS and the written testimony. David Smith testified that the more detailed description was added in December at the request of the SEC "to clarify for the benefit of investors the intentions of [the Smiths] with respect to the proposed Channel 2 facility." (FJ PFC at 67 and Tr. 1908-09; 2187.) Thus, by December 1993, after the conclusion of Phase I of the hearing, it was made clear to the SEC by Sinclair that the Smiths would remain with Sinclair even if Four Jacks should acquire Channel 2. The same information became available to the Federal Communications Commission only by the evidence introduced by Scripps Howard in Phase II.

35. There is other Four Jacks disclosure in the written testimony that is considered. Each of the written testimonial statements of the Smiths includes the following language:

[N]otwithstanding SBG's [Sinclair's] other media interests, I am able and committed to carrying out my pledge to manage, on a full-time basis, a VHF television station in Baltimore, Maryland, —.

(FJ Exhs. 2, 3, 4.) The phrase "notwithstanding SBG's [Sinclair's] other media interests" reasonably implies that those "other media interests" would include Sinclair, although the name Sinclair was not used. It also could reasonably be assumed that without making a specific pledge of divestment or trust arrangement, the Smiths would continue to hold their stock in Sinclair. But the evidence does not establish that the Smiths could continue to serve as Sinclair's officers and directors and continue to

¹¹ Four Jacks was making its ultimate Commission disclosure of integration upon the exchange of its testimony on September 13, 1993. Sinclair was simultaneously disclosing related business risks to the SEC. On September 28, 1993, Sinclair disclosed to the SEC under the category of "Dependence on Key Personnel" that "[t]he loss of services of any of the present officers and especially its President and Chief executive Officer, David D. Smith, may have a material adverse effect on the operations of

[Sinclair]." (SH Exh. 40, Tab 14 at 17.) In recognition of the importance of David Smith to the success of Sinclair's business, Sinclair had insured his life for \$5 million. (*Id.*) A prospective investor might reasonably presume that David Smith intended to remain as Sinclair's full-time Chief Executive Officer without any distractions for the foreseeable future. (Tr. 1076, 1095, 1895.)

carry out the functions associated with those positions while working 40 hours each week in their allotted positions at Channel 2.

36. The Smiths also testified that the phrase "then-current employment" was directed to possible employment that might exist in the future when Four Jacks was awarded the license for Channel 2. Some bizarre future employment scenarios were suggested (e.g. McDonalds [Tr. 2092], lemonade stand [Tr. 2092]) which would be abandoned or curtailed in order for the Smiths to fulfill their integration pledges. The Smiths also presented evidence that their supervisory duties at Station WBFF(TV) would be eliminated because their UHF Baltimore facility would need to be divested if WMAR-TV were acquired. (Tr. 1917-19; FJ Exhs. 26, 27, 28.) The hypothetical jobs are rejected as such and the definitive pledge to divest Station WBFF(TV) is irrelevant.

The Smiths as Employees of Sinclair

37. Notwithstanding usages in Commission filings of the term "employee" to describe relationships with Sinclair and the admissions of employee status on cross-examination, the Smiths testified that they do not consider themselves to be "employees" of Sinclair "in the traditional sense." (See FJ PFC at 61 and FJ Exhs. 26, 27, 28.) David Smith explained that he and his brothers are owner/operators and they do not have any of the limitations on their movements as would be the case with traditional employees such as salaried office workers. (*Id.* and Tr. 1771, 1822, 1919, 2009, 2133.) That opinion is shared by Robert Smith (Tr. 2010, 2036) and Frederick Smith (Tr. 2137-39.)

38. There is documentary evidence in the record which supports these views of the Smiths. Compensation paid the Smiths is reflected in the corporate income tax returns as "compensation of officers." (SH Exh. 40, Tab 1.) A Sinclair minute of February 2, 1993, reports an authorized bonus to be paid to the "owners" in the amount of 20% of Sinclair's 1992 excess cash flow. (SH Exh. 40, Tab 27.) And another Sinclair minute of September 20, 1993, authorized the payment of bonuses to the Smiths as compensation for "executive officers/principals" for their successfully carrying out "executive" functions that advanced the business of Sinclair. (SH Exh. 40, Tab 45.) Disclosure documents filed with the SEC referred to "Executive Compensation" for the Smiths. (SH Exh. 26 at 55; SH Exh. 31 at 57; SH Exh. 34 at 58; SH Exh. 40, Tab 18 at 18.) Finally, David, Robert and Frederick Smith are enrolled in an exclusive health program that is available to "Officers Only". (SH Exh. 40, Tab 29 at 1; Tr. 2027-28, 2040.)

39. On the other hand, Scripps Howard introduced certain of the business records of Sinclair to show that the Smiths were treated as employees for purposes of reporting to agencies. The names of the Smiths are included in a list that is submitted with payments to the Maryland unemployment insurance agency because the information is required by a state form. Also, payments to the Smiths are generated through the same payroll system that administers compensation to the employees of Sinclair and its subsidiaries. In general, the Smiths were not concerned or even

knowledgeable of how their earnings were being reported on Forms W-2. Nor were they informed about their Forms W-4. These were documents that were merely forwarded to their accountants. Nor were they concerned whether they are considered "employees" for income tax reporting purposes. David Smith testified that he has never read the 401(k) plan. Nor had he seen the company's health benefit plan before being deposed in this case. The testimony of Robert and Frederick on these same points were similar. While Scripps Howard was able to show that the Smiths were reported as "employees" of Sinclair to various agencies, this evidence does not detract from the finding that they conduct themselves more as owners of Sinclair than as salaried employees as those words are commonly understood in everyday usage.

The Smiths' Integration by Committee

40. Each of the TV stations owned by Sinclair has a full-time General Manager who is responsible for the station's day-to-day operations. (FJ Exh. 2 at 2 and Tr. 1144, 1250, 2107.) Also, each of the stations has its own Business Manager and a business department. (Tr. 1145.) Sinclair has employed a full-time Comptroller who oversees the daily business transactions of the stations. (*Id.*) The Smiths talk with Station Managers intermittently approximately once each week. (Tr. 2111.) Their management style is further illustrated by the division of management responsibilities among the three brothers who work each day in the same office.¹² Each of the brothers has an area of interest. David Smith is primarily involved in strategy planning, including the acquisition of new stations. (Tr. 1996.) David Smith also handles most of Sinclair's syndication negotiations. (Tr. 2108.) He testified that those activities do not require an extensive amount of time. (Tr. 2000.) Robert Smith testified that he has responsibility for supervising the overhead which involves signing off on order requests. (Tr. 2065, 2107-09.) But he does not ordinarily review the individual station sales reports. (Tr. 2106.) Frederick Smith testified that he relies on the station personnel and apparently he does not exercise much supervision. (Tr. 1336-37.) In September 1994, he had cut back his involvement with Sinclair by a factor of about 50% and he was involved with selecting a company aircraft. He also was building a house for himself. (Tr. 2224-6.)

41. There is nothing in the past experience of the Smiths or in their work habits upon which to base a reasonable probability of the feasibility of the Four Jacks integration proposal. David, Robert and Frederick Smith represent that they intend to work at Station WMAR-TV at least forty hours each week. The brothers testified that they would switch to a "management committee" concept from the current "executive committee" approach at Sinclair. (Tr. 2101, 2205-06.) In that way, the three Smiths would operate at Four Jacks as a team of nominal department heads: David as the General Manager, Robert as Station Manager, and Frederick as Operations manager. (Tr. 2100, 2112, 2205-07, 2209-10.) That conclusion is consistent with the integration disclosure of the Form 301 Application that despite their holding titles of General Manager, Station Manager and Operations Manager, the Smiths will run

¹² Scripps Howard examined the Smiths extensively on their involvements with the individual TV stations and with respect to the small service corporations that are used as collection points for rentals on tower spaces and conduits for maintaining

WBFF(TV)'s transmitter. There was no evidence establishing that the Smiths' supervision of those small companies took an appreciable amount of time.

Four Jacks as a "managing committee"¹³ (SH Exh. 46 [Exh. 6 to Form 301].) The Smiths testified that they had not yet discussed whether or not they will have some overall management committee in place, formally or informally, in connection with the operation of Channel 2. (Tr. 1149; 1271-72; 1924; 2210.) Therefore, it can only be concluded that Channel 2 would be managed by a committee, no matter what it would be called, in substantially the same manner as the other Sinclair subsidiaries.

42. Overall, the evidence indicates that none of the Smiths has set hours for whatever tasks they perform at Sinclair. They each arrive at the office and leave at times they deem appropriate. (FJ Exh. 26 at 3; Tr. 1990, 2063, 2105.) David, Robert and Frederick Smith spend much of their time at Sinclair reading the trade press, responding to telephone calls, talking among themselves, contemplating business opportunities, and speaking to operating personnel who service the Baltimore WBFF(TV) facility. (Tr. 1143-44, 1248, 1338-39, 2226.) Based on the absence of any plan to show how the Smiths would assume Four Jacks' day-to-day management, it is found that the Smiths would manage WMAR-TV in the same way that they manage the other Sinclair stations. In view of the acquisition strategy of Sinclair, it cannot be concluded that the Smiths could or would devote eight hours each day to the management of one TV station.

43. Four Jacks has argued since Scripps Howard filed its motion to add the issues that the integration pledges did not go so far as to include the Smiths leaving their positions at Sinclair. After reviewing the evidence and observing the witnesses testify, it is found here as a fact that the incomplete disclosures of Four Jacks in its Form 301 Application, in its IDS, and in the sworn written testimony of the three Smiths were not meant to inform the Commission that the Smiths would resign from all positions of employment held by the Smiths on the date that they were awarded the license. That pledge would apply only to positions of employment that might interfere with Four Jacks' integration. And since the evidence establishes that the Smiths intended to operate Four Jacks as a committee, their employment with Sinclair would not interfere with the limited type of "integration" that was intended.

DISCUSSION

Scripps Howard

44. The misrepresentation/lack of candor issues were necessary to discover the facts and circumstances of the failures of Scripps Howard to produce relevant evidence with respect to the NBC correspondence and the Covington notes.¹⁴ Also, it has been held that allegations of misrepresentation and/or lack of candor in discovery present sub-

stantial questions of fact. *Washington's Christian TV Outreach*, 99 F.C.C. 2d 395, 400-401 (Review Bd 1984) ("truthfulness and candor are as much expected in discovery as they are with respect to submissions to the Commission itself.") See also *WNST Radio*, 70 F.C.C. 2d 1036 (Review Bd 1978). But here the issues are resolved in favor of the renewal applicant. The documents with respect to both the NBC correspondence and the Covington notes were produced ultimately by Scripps Howard. While the testimony of Ms. Barr raised substantial questions, the NBC facsimile correspondence was identified by Ms. Barr in her deposition of July 1993. Discovery enforcement was not sought by Four Jacks until October 1993.¹⁵ Four Jacks obtained copies of the NBC correspondence in time for their use at the hearing in November. The Covington notes had been forwarded timely by Ms. Barr on behalf of Scripps Howard to its attorneys. She also informed Scripps Howard's officers of the transmission. Therefore, Scripps Howard had done its job in complying with discovery of the Covington notes. While Ms. Barr may have had incidents of a faulty memory, she was consistent in disclosing that there were notes prepared by Janet Covington which were used in preparing the renewal exhibit. *Compare Broadcast Associates of Colorado*, 104 F.C.C. 2d 16 (Comm'n 1986)(inaccurate deposition testimony insufficient to warrant disqualification). And as a result of Ms. Barr's efforts, Four Jacks obtained discovery of the notes in time to examine Ms. Barr in Phase II and to preserve the testimony of Mrs. Covington in a deposition.¹⁶

45. There was a failure to make a timely disclosure of the Covington notes. But it was the Scripps Howard attorneys who failed to produce the document of which they had custody since June 1993. The Presiding Judge has made factual findings that Ms. Barr had timely disclosed the notes to counsel and Scripps Howard should be allowed to rely on its trial counsel to properly disclose the notes in discovery in the event the Presiding Judge ordered disclosure. For their part, counsel for Scripps Howard fought vigorously against disclosure and it was found that their reading of Four Jack's document request was incorrect. But it was at least an arguably plausible litigator's interpretation. See *Memorandum Opinion and Order*, FCC 94M-177, released March 18, 1994 at 3 n.2.

46. More importantly, the Commission has held that the conduct or misconduct of the applicant is the primary focus of the hearing and that counsels' conduct is merely tangential to the inquiry. *Opal Chadwell*, 2 F.C.C. Rcd 1197, 1198 (Review Bd 1987), *aff'd*, 2 F.C.C. Rcd 3458 (Comm'n 1987). As that policy is applied here, the focus is on Ms. Barr's testimony. She never denied the existence of facsimile correspondence with NBC and she timely forwarded the Covington notes to counsel. Scripps Howard did its part with respect to the evidence and its license

¹³ *Compare Minority Broadcasters of East St. Louis, Inc.*, 99 F.C.C. 2d 264, 267 (Review Bd 1984), *modified*, 57 Radio Reg. 2nd (P&F) 1390 (Comm'n 1985) (identified positions such as station manager must have management responsibilities that are implied in the title).

¹⁴ It is not clear whether the Commission's procedures for fines and forfeitures would apply to a failure to make discovery. See *Algreg Cellular Engineering, et al.*, 9 F.C.C. Rcd 5098, 5149 (power of presiding trial judge to inquire into abuse of process and to assess forfeiture for failures of attorneys to make timely discovery not reached by Review Board.)

¹⁵ There was no request by Four Jacks' attorneys for a con-

ference which could have been held immediately following the Barr deposition. The Presiding Judge would have been in a position to require that the NBC facsimiles be thoroughly searched for and that if necessary, subpoenas of NBC for the documents would have been authorized. Instead, Four Jacks waited until October 1993, and then submitted an *ex parte* subpoena request which could have led to a delay of the proceeding.

¹⁶ Due to a severe personal hardship if required to testify, Mrs. Covington's deposition testimony was received in evidence and she was not required to further testify. See *Memorandum Opinion and Order*, FCC 94M-512, released September 7, 1994.

should not be jeopardized by the treatment of documentary evidence by its counsel in discovery. Cf. *Algreg Cellular Engineering, supra* at 5150 (close examination of record reflects the witness apparently complied with directives to search for documents). Therefore, the weight of Commission authority requires a ruling here that the basic qualifying issues added against Scripps Howard be resolved in its favor.¹⁷

Four Jacks

47. It is concluded after a review of the evidence that the Smiths are "executive" employees and that they never intended to divest themselves from their positions with Sinclair.¹⁸ Yet Four Jacks never explains why it was not made clear in its various integration pledges to the Commission (as it was made clear to the SEC) that they would remain with Sinclair and manage Channel 2 by committee while retaining their executive positions with Sinclair. The Commission was entitled to a full and complete statement as to what was intended. Yet no party who advances Four Jacks' position has come forward with an explanation.¹⁹

48. Four Jacks' motive for intending to convey a meaning of full divestment of current employment could be to gain a comparative integration credit. If the Commission could be convinced that the Smiths would withdraw from all employment, including Sinclair's operations, and devote 100% of their time to Channel 2, the integration proposal more likely would be a credible one and Four Jacks' comparative case would be substantially strengthened. Conversely, if Four Jacks failed to make a convincing case for the integration credit, the Smiths' expectations of receiving the license for Channel 2 in a comparative challenge would be substantially diminished, if not eliminated. What may not have been accounted for was the cross-examination and the use of the SEC evidence that would reveal clearly and unequivocally the Smiths' intentions to stay with Sinclair whether or not the Smiths are deemed to be "employees" of Sinclair.

49. Rather than explain its incomplete disclosure, Four Jacks focuses on the Presiding Judge's question about the possibility of full integration while the Smiths remain with Sinclair. Four Jacks quotes the concern without contesting the accuracy of the underlying facts:

While it is recognized that Sinclair is a holding company for the three Fox affiliates and that day-to-day operations are conducted by individual station managers who are answerable to the Smiths, the full-time and attention of the three Smiths are at Sinclair, including its ongoing acquisition program.

Memorandum Opinion and Order FCC 94M-51, supra at Para. 8 and Four Jacks' PFC at 88-89. These are ultimate facts which are more significant than the myriad of evidence that was introduced on "employment." These stated concerns are central to Four Jacks' disclosure that the Smiths intended to "integrate" into the management of Four Jacks while retaining their positions of the day-to-day control and operation of Sinclair, the holding company. See *Kevin Potter*, 7 F.C.C. Rcd 4342 (Comm'n 1992) (to sustain claim for full-time integration where other business is retained applicant must set forth a specific and credible plan explaining how business would be managed to accommodate integration), citing *Blancett Broadcasting Co.*, 17 F.C.C. 2d 227 (Review Bd 1969). There was no plan presented. The Smiths were not even prepared to establish in their testimony how they would operate through Sinclair and/or rearrange Sinclair's affairs and still be able to integrate into the day-to-day operations of Four Jacks, a scenario that had never been thought through by the Smiths. See *Pleasure Island Broadcasting, Inc.*, 6 F.C.C. Rcd 4163, 4165 (Review Bd 1991) (convincing plan needed to show that a retained business will not interfere with a full-time integration commitment). Rather than fully disclose and proffer a plan, Four Jacks left it to the Bureau, Scripps Howard, and the Presiding Judge to probe for the full meaning of the Smiths' integration pledges.

50. In *Evansville Skywave, Inc.*, 7 F.C.C. Rcd 1699 (Comm'n 1992), the Commission acknowledged "the distinction between finding a proposal unreliable for comparative purposes and finding that an applicant's proposal reflects disqualifying conduct." *Id.* at 1700. For that purpose, it was held to be proper for the trial judge in *Evansville*, as was done here, to add issues of misrepresentation and/or lack of candor. *Id.* at n.7. See also *Royce International Broadcasting*, 5 F.C.C. Rcd 7063-65 n.6 (Comm'n 1990) (the record may indicate that an applicant's integration proposal is not only unreliable but contains false statements amounting to disqualifying representations). The questionable statements were the

¹⁷ In cases for a new allocation, applicants will be bound by the disservice of their agents, including attorneys. *Hillebrand Broadcasting, Inc.*, 1 F.C.C. Rcd 419 (Comm'n 1986) (new service to the public is paramount and timely compliance with rulings of presiding judges is required at the risk of an application). But where dismissal would be the penalty, conditions for that remedy have been established by this Circuit. See *Communi-Centre Broadcasting, Inc. v. F.C.C.*, 856 F.2d 1551, 1554 (D.C. Cir. 1988) (there must be consideration given to (1) the applicant's justification for the failure to comply with an order; (2) prejudice to the other parties; (3) the burden shown to operate on the administrative system; (4) the need to deter future misconduct.) A dismissal of Scripps Howard's application would not be appropriate under those standards. The attorneys were reacting as litigators to discovery requests and discovery was ultimately completed. The only prejudice to Four Jacks was delay and expense which was in part invited as a result of the three months lapse before seeking relief.

¹⁸ Four Jacks was assigned the burden of establishing by a preponderance of the evidence that it is qualified to be a li-

censee. *Telestar Inc.*, 2 F.C.C. Rcd 7352-53 (Comm'n 1987). See also *Greenwich Collieries v. Maher Terminals, Inc.*, 510 U.S. - , 114 S. Ct. 2251 (1994); and *Steadman v. SEC*, 450 U.S. 91, 101 S. Ct. 999 (1981).

¹⁹ The Bureau argues that the "real question" is simply whether the duties that the Smiths would perform for Sinclair if the Four Jacks application were granted are of such a nature that they would interfere with the integration commitment in this proceeding. However, the Bureau offers no justification on why Four Jacks did not fully disclose right from the beginning the true intentions of the Smiths to stay as executive-employees of Sinclair even if Four Jacks is awarded the application. The Review Board has found a lack of candor when an applicant "breaches its duty to be fully forthcoming as to all facts and information relevant to a matter before the FCC, whether or not such information is elicited." *Silver Star Communications*, 3 F.C.C. Rcd 6342, 6349 (Review Bd 1988), quoted with approval in *Swan Creek Communications v. F.C.C.*, 39 F. 3d 1217, 1222 (D.C. Cir. 1994).

commitments of the Smiths to leave all "then-current employment" and to "limit or terminate any other activities that might interfere with my integration commitment" without having specifically stated intentions of removing or limiting their responsibilities and activities as executives of Sinclair. It was only in SEC disclosures that Four Jacks made clear that there was never any intention to terminate or significantly limit the Smiths' involvement with the activities of Sinclair in order to integrate fully into the day-to-day management of Four Jacks.

51. Sinclair's SEC disclosure at the time of the exchange of testimony and the cross-examination of the Phase I hearing advised that the Four Jacks venture could present a conflict with Sinclair in the allocation of the Smiths' time. But after Phase I concluded, Sinclair changed its disclosure and began advising the SEC in December 1993 that "such commitment of resignation" would not require the Smiths to leave Sinclair. The feasibility of the proposal had become suspect when Scripps Howard opened its cross-examination. The post hearing disclosure to the SEC, which is highly reliable evidence, was introduced by Scripps Howard in Phase II. It showed the unvarnished truth, i.e., a clear unequivocal commitment on the part of the Smiths to remain with Sinclair as full time executive-employees no matter how this case is decided. There has never been an explanation offered by Four Jacks as to why it was decided to give this Commission the inferior disclosure. It has been held in this Circuit:

As a licensing authority, the Commission is not expected to "play procedural games with those who come before it in order to ascertain the truth."

RKO General, Inc. v. F.C.C., 670 F.2d 215, 229 (D.C. Cir. 1981).

52. After the Smiths were off the stand at Phase I's completion, Sinclair assured the SEC that none of the Smiths "has committed to resign" from Sinclair or has committed to "dispose of his ownership interests" in Sinclair. That intent, which was clearly and positively disclosed by Sinclair to the SEC in December 1993, was never presented to the FCC by Four Jacks in a disclosure document. See 47 C.F.R. §1.65 (an applicant must maintain the accuracy and completeness of an application by furnishing additional or corrected information).²⁰ (Emphasis added.) The corrected disclosure was made to the SEC. But it was never made to the FCC in a Four Jacks' filing. Without the Phase II inquiry and the resulting revelations of conflicting federal agency disclosures, this Commission would have been left with the incomplete disclosures that the Smiths would resign from "then-current employment," the plain meaning of which included employment at Sinclair.

53. Despite this lack of full disclosure to the Commission, there is not sufficient evidence found in this record to show the required intent to deceive. See *Weyburn Broadcasting Limited Partnership v. F.C.C.*, 984 F.2d 1220, 1232 (intent to deceive is an essential element of misrepresenta-

tion or lack of candor showing). For example, at the outset of the hearing, the Presiding Judge required that Four Jacks disclose the "hourly integration commitments" of the Smiths and "their intentions to leave current employment." *Prehearing Conference Order, supra*. The IDS made no specific mention of leaving Sinclair and therefore the IDS negatively inferred intentions of the Smiths to stay on at Sinclair. That inference is supported by later testimony wherein the Smiths consistently denied any intention of leaving Sinclair. Therefore, it is concluded that notwithstanding inadequate disclosures to the Commission, after considering the totality of the evidence, findings cannot be made here that Four Jacks' overall conduct showed the "deceptive or abusive intent" necessary to sustain a conclusion that Four Jacks "committed disqualifying misconduct." *Evansville, supra* at 1701.

SETTLEMENT

54. The Commission's rules with respect to the settlement of renewal cases provide that where a competing applicant seeks to dismiss an application prior to the issuance of an Initial Decision, "neither the applicant nor its principals [may receive] any monetary or other consideration in exchange for dismissing or withdrawing its application." 47 C.F.R. §73.3523(b)(1). The term "other consideration" consists of "financial concessions" as well as "nonfinancial concessions that confer any type of benefit on the recipient." *Id.* at (d)(4). See also *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants*, 4 F.C.C. Rcd 4780 (1989),²¹ clarified on recon., 5 F.C.C. Rcd 3902 (1990). In order to eliminate the practice of applications filed to extract "settlement payments", the Commission adopted measures to remove any profit incentive. 4 F.C.C. Rcd at 4784. Under a literal interpretation of the prohibition, anything of value which a competing applicant receives which would not be obtainable without filing a challenging application would be "consideration." 47 C.F.R. §73.3523(d)(4). But the Commission's primary concern was the disservice to the public of "settlement payments" made to competing applicants seeking to extract a monetary settlement prior to an Initial Decision.

55. On March 24, 1995, Scripps Howard and Four Jacks submitted a Joint Request For Approval Of Settlement Agreement ("Settlement") wherein the two parties agree to the dismissal with prejudice of the Four Jacks application and the grant of Scripps Howard's renewal application. The Agreement, to which Sinclair is also a party, is contingent upon favorable resolution of the qualifying issues that were added against both parties. The Settlement would not involve any "settlement payment" by either party. The only consideration would be the dismissal of the Four Jacks competing application here and the dismissal of Scripps Howard's pleadings which are opposing requests of Sinclair subsidiaries for Commission administrative relief.²²

²⁰ Section 1.65 has been interpreted by the Commission to require "all facts---that may be of decisional significance so that the Commission can make a realistic decision based on all relevant factors." *Southern Broadcasting Co.*, 30 F.C.C. 2d 461, 464 (Review Bd 1972). It seems self-evident that the disclosures to the SEC should have been made to the FCC as well.

²¹ Programming ascertainment or employment concessions are two examples of the nature of the "other consideration" which the Commission intends to prohibit. *Id.* at 4796 n.75. There are no such concessions in this Settlement.

²² These unrelated proceedings involving TV stations that are owned by subsidiaries of Sinclair include: (a) Request for As-

56. On April 3, 1995, the Bureau filed Comments On Joint Request For Approval Of Settlement Agreement ("Comments"). The Bureau supported all terms of the Settlement except a provision entitled "Further FCC Filings" (Settlement at Para. 8) whereby Scripps Howard and Four Jacks mutually agree to not directly or indirectly:

file, or encourage, induce, or pay any other person or entity to file, any document with the Commission (including, but not limited to, any petition to deny, informal objection, or mutually exclusive application [but] excluding documents filed in proceedings generally applicable to the broadcast industry as a whole) that opposes the grant of any application filed by [Scripps Howard and its subsidiaries or affiliates/Sinclair and its subsidiaries or affiliates or by any entity that had, has, or will have a then-current agreement to provide programming for more than 25% of the broadcast time of a broadcast station] between (i) the date of filing of the Four Jacks application; and (ii) the date ten (10) years from the date of execution of this Agreement—.

The Bureau objected to this provision in its first Comments on the grounds that it would be against the public interest to prevent either party from bringing information to the Commission's attention where there is a *bona fide* belief that a station is not being operated in the public interest, citing *Nirvana Radio Broadcasting Corporation*, 4 F.C.C. Rcd 2778, 2779 (Review Bd 1989). In that case, the Review Board would not accept a pledge precluding any filing with the Commission which might jeopardize identified broadcast facilities because such a pledge was open ended and therefore would not be in the public interest.

57. Scripps Howard and Four Jacks twice requested and were twice granted extensions of time in order to file a Reply pleading which would address the Bureau's Comments. See *Order FCC 95M-111*, released April 20, 1995, and *Order FCC 94M-114*, released April 26, 1995. On April 28, 1995, the applicant parties filed their joint Reply which clarifies the applicants' intentions and which meets the Bureau's objection. Now Scripps Howard and Four Jacks represent that the language of the Settlement quoted above does not preclude either party from reporting a violation to the Commission.²³

58. To make clear their intent, Scripps Howard and Four Jacks represent in their Reply pleading that:

Paragraph Eight [of the Settlement] does not prohibit either party from filing with the Commission a declaratory statement bringing relevant information to the Commission's attention, so long as the statement does not object, formally or informally, to the grant of an application.

That representation is treated here as being incorporated into the Settlement as a material clarification. It is now evident that the parties consider themselves free to report relevant information to the Commission at anytime and that they have agreed only to refrain from "[acting] as an advocate for any particular course of action by the Commission based on the submitted information." And even that limitation applies for a limited period of time, i.e. ten years from the signing of the Settlement.

59. The Settlement also provides in Paragraph 8 that the parties will not file "mutually exclusive applications" for the next ten years. Were such a provision to have an adverse effect in the coverage area, as in a covenant not to compete, it could prevent a future filing which might involve improvement in service to the public. See *James S. Rivers, Inc.*, 26 F.C.C. 4 (Comm'n 1959). But there already exists competition in the Baltimore television market between Scripps Howard and Four Jacks. Furthermore, both parties are able under the Settlement to continue to upgrade present facilities, construct new facilities or acquire other facilities in the same market. And in view of the history of conflict between Scripps Howard and Sinclair, the parties are entitled to a ten year respite from litigation at the Commission. See *Intercontinental Radio, Inc.*, 62 Radio Reg. 2d (P&F) 1565, *supra* at 1567 (Comm'n 1985) (Commission approves settlement provision which would prevent subsequent filing of competing applications for twelve years).

60. It is concluded that Section 73.3523(b) does not prohibit a settlement here since the policy against settlement payments to non-*bona fide* competing applicants is not adversely effected. A settlement on all fronts would be the most efficient outcome and one that is in the public interest. Four Jacks made a *bona fide* challenge in its competing application for Channel 2. There was no expectation of Four Jacks receiving any monetary payoff. The non-monetary benefit that Sinclair²⁴ and the Smiths would receive in settling the case at this time would be the removal of challenges which Scripps Howard has made to pending but unrelated assignments of Sinclair controlled stations. As noted by the Bureau, Four Jacks, the entity making the challenge, receives no benefit from the Settlement.²⁵ Significantly, there is to be no monetary payoff even for costs. Settlement presents additional significant

signment of License of WTTQ(TV) Birmingham, Alabama (BALCT-930816KV); (b) Request for Assignment of License of WCGV-TV, Milwaukee, Wisconsin (BALCT-930816KU); (c) Request for Assignment of License of WVTQ(TV), Milwaukee, Wisconsin (BALCT-940829KF); and (d) Request for Assignment of License of WNUV(TV), Baltimore, Maryland (BALCT-941214KI).

²³ On May 4, 1995, the Bureau submitted *sua sponte* its Comments on the Reply wherein the Bureau acknowledges that it has been persuaded by the clarification and that the Bureau withdraws its objection to Paragraph 8 of the Settlement. The Presiding Judge has received and considered the Bureau's Comment. See 47 C.F.R. §1.294(d) (additional pleadings may be authorized by the presiding officer).

²⁴ The Bureau takes the position that Scripps Howard's request to dismiss the challenges to Sinclair's petitions to assign does not leave Four Jacks in any better position than before Four Jacks filed the challenging application. That proposition is literally true and correct. The real party-in-interest to the "consideration" is Sinclair, the holding company which although not a party to this proceeding, owns the effected stations which would receive the benefit from the Settlement. And the Smiths own and control all of the effected entities.

²⁵ Four Jacks was organized by the Smiths as a corporate entity which is separate and apart from Sinclair. The purpose of Four Jacks was the acquisition of Channel 2. That purpose no longer exists.

efficiencies since it will remove from the Commission's docket those other proceedings as well as this litigation matter. For its part, the licensee Scripps Howard will have the uncertainty of a challenge dismissed. And considerable Commission resources will be saved.²⁶ All of these factors, combine to meet the Commission's policy and analysis on renewal settlements which states that:

settlements, *where abuse of process is not a factor*, can be an efficient way to resolve comparative licensing proceedings, preserve funds for service to the public, and allow [the Commission] to preserve [its] limited resources.

4 F.C.C. Rcd at 4784. (Emphasis in original.)³³

CONCLUSIONS OF LAW

61. The Presiding Judge has determined the following conclusions of law:

A. There is not a preponderance of substantial evidence in the record to establish that Scripps Howard misrepresented or lacked candor in connection with deposition testimony and/or pleadings and/or the production of documents and/or related correspondence, and Scripps Howard has sustained its burden of proof on the issues added in FCC 94M-50.

B. There is not a preponderance of substantial evidence in the record to establish that Four Jacks misrepresented or lacked candor in its application, pleadings, documents and/or testimony regarding its integration commitment to resign then current employment positions of its principals, and Four Jacks has sustained its burden of proof on the issues added in FCC 94M-51.

C. A preponderance of substantial evidence shows that Four Jacks' application was not filed for the purpose of achieving a monetary settlement payment.

D. The prohibition in Section 73.3523(b) against considering a settlement that is supported by consideration before issuance of an Initial Decision does not apply under the procedural posture of this case.

E. The proposed Settlement, as clarified by the parties' joint Reply of April 28, 1995, is in accord with the Commission's rules and policies regarding settlement of comparative renewal cases, and Scripps Howard and Four Jacks have met the burden of persuasion that approval of the Settlement in this case would be in the public interest.

²⁶ At the early stages of this proceeding, Four Jacks sought issues against Scripps Howard under allegations of anticompetitive conduct, racial discrimination, and abuse of commission processes. None of those issues were added. See *Memorandum Opinion and Order*, FCC 93M-445, released July 8, 1993. The abuse of process allegations cited petitions for reconsideration of short-form assignments of three TV stations owned by Sinclair. Those petitions were filed by Scripps Howard shortly after Four Jacks had filed its competing application for Channel 2. *Id.* at paras. 8-12. There also was an opposition filed by Scripps Howard to a solution to a problem in connection with the tower height of a Sinclair subsidiary. *Id.* at paras.

ORDER

Accordingly, IT IS ORDERED that the Joint Request For Approval Of Settlement Agreement filed on March 24, 1995, by Scripps Howard Broadcasting Company and Four Jacks Broadcasting, Inc., as clarified,²⁷ IS ACCEPTED and APPROVED.

IT IS FURTHER ORDERED that the application of Four Jacks Broadcasting, Inc. (File No. BPCT-910903KE) for a construction permit for a new television facility on Channel 2 in Baltimore, Maryland IS DENIED and the application IS DISMISSED with prejudice.

IT IS FURTHER ORDERED that the application of Scripps Howard Broadcasting Company (File No. BRCT-910603KX) for the renewal of license at station WMAR-TV, in Baltimore, Maryland IS GRANTED.²⁸

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

9-10. Resolution of those proceedings which are pending on several fronts is tantamount to an armistice.

²⁷ Clarification is provided in the Reply of Scripps Howard Broadcasting Company and Four Jacks Broadcasting, Inc. to Mass Media Bureau's Comments on Joint Request for Approval of Settlement Agreement filed on April 28, 1995.

²⁸ The above *Partial Initial Decision* disposes of this case in its entirety. *Garden State Broadcasting Limited Partnership v. F.C.C.*, 996 F.2d 386, 394 at n.10 (D.C. Cir. 1993). It shall become effective 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).